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Respondent.

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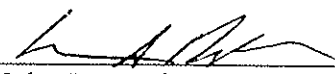
4. EPA further alleges that the Final Four Plant Report “contains information which reasonably supports the conclusion that hexavalent chromium exposure presents a substantial risk of injury to the health of certain workers in modern chromium production facilities utilizing low-lime or no-lime kiln manufacturing processes”; that Elementis did not immediately inform the Administrator of the EPA that it obtained the Final Four Plant Report; that Elementis’ alleged failure to so inform the Administrator is a violation of TSCA § 8(e), 15 U.S.C. § 2607(e); and that Elementis’ alleged failure to inform the Administrator, as required by TSCA § 8(e), is unlawful under TSCA § 15(3)(B), 15 U.S.C. § 2614(3)(B). Compl. ¶¶ 43, 49-51.

5. EPA’s claim of alleged violation of TSCA § 8(e) is subject to the five-year statute of limitations set forth at 28 U.S.C. § 2462.

6. EPA’s claim accrued after Elementis failed to “immediately” inform the agency when it received the Final Four Plant Report on October 8, 2002.

7. Accordingly, the Complaint filed on September 2, 2010 is time-barred by the five-year statute of limitations and, therefore, must be dismissed in its entirety.

**WHEREFORE**, for all the foregoing reasons, and those set forth in Elementis’ accompanying Memorandum of Law in Support of its Motion for Judgment on the Pleadings, Elementis respectfully requests that the Presiding Officer grant its Motion for Judgment on the Pleadings and enter the Order submitted herewith.

  
\_\_\_\_\_  
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**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

IN THE MATTER OF:	)	
	)	
	)	Docket No. TSCA-HQ-2010-5022
Elementis Chromium, L.P.,	)	
	)	
	)	
Respondent.	)	
	)	

**ORDER**

The Presiding Officer having considered Respondent Elementis Chromium Inc.'s Motion for Judgment on the Pleadings, and any opposition thereto,

**IT IS ORDERED** that Respondent Elementis Chromium Inc.'s Motion for Judgment on the Pleadings be and hereby is **GRANTED**,

**AND IT IS FURTHER ORDERED**, that the Complaint and Notice of Opportunity for Hearing filed by the United States Environmental Protection Agency on September 2, 2010, be and hereby is **DISMISSED WITH PREJUDICE**.

\_\_\_\_\_  
Presiding Officer

IN THE MATTER OF:

Elementis Chromium, L.P.,

Respondent.

<sup>1</sup> Elementis Chromium LP was merged into Elementis Chromium GP Inc. on September 10, 2010. Elementis Chromium GP Inc. then changed its name to Elementis Chromium Inc.

U.S.C. § 2607(e). EPA's Complaint, however, must be dismissed in its entirety because it was filed almost three years after the expiration of the applicable statute of limitations. The allegations in the Complaint pertinent to this Motion are set forth below.

EPA alleges that, on October 8, 2002, Elementis obtained the Final Four Plant Report which was prepared by Applied Epidemiology for the IHF Chromium Chemicals Health and Environmental Committee. See Compl. ¶¶ 35 and 41. EPA also claims that the Final Four Plant Report contains information that reasonably supports the conclusion that hexavalent chromium exposure presents a substantial risk of injury to the health of certain workers in modern chromium production facilities utilizing low-lime or no-lime kiln manufacturing processes. See Compl. ¶ 43. EPA further alleges that Elementis was required to "immediately" inform the Administrator of the EPA of the information in the Final Four Plant Report and that Elementis' failure to do so constitutes a violation of TSCA § 8(e), 15 U.S.C. § 2607(e) and an unlawful act under TSCA § 15(3)(B), 15 U.S.C. § 2614(3)(B). Compl. ¶¶ 49-51.

On September 2, 2010, EPA filed its Complaint under the civil penalties provision at TSCA § 16(a), 15 U.S.C. § 2615(a). See Compl. at Sec. I. On October 4, 2010, Elementis filed its Answer and Affirmative Defenses to the Complaint. Elementis now brings this Motion for Judgment on the Pleadings because EPA's Complaint was filed outside the statute of limitations for the claim asserted in the Complaint.

EPA's five-year general statute of limitations set forth at 28 U.S.C. § 2462 applies to EPA's claim under TSCA § 8(e). This claim accrued on November 7, 2002, when Elementis allegedly failed to "immediately" inform the EPA Administrator of the information in the Final

Four Plant Report.<sup>2</sup> Accordingly, EPA had until November 7, 2007 to file a claim against Elementis that it violated TSCA § 8(e).<sup>3</sup> Because EPA's Complaint was not filed until September 2, 2010 – almost three years outside the limitations period – it is time-barred and must be dismissed in its entirety.<sup>4</sup>

## II. ARGUMENT

### A. Governing Standard

The standard of review of a motion for judgment on the pleadings is essentially the same as that for a motion to dismiss for failure to state a claim upon which relief can be granted. See Nat'l Shopmen Pension Fund v. Disa, 583 F. Supp. 2d 95, 100 (D.D.C. 2008). The “Court will dismiss a claim if the plaintiff fails to plead ‘enough facts to state a claim for relief that is plausible on its face.’” Id. (citations omitted). The Court must construe the allegations and facts in the complaint in the light most favorable to the plaintiff and must grant the plaintiff the benefit of all inferences that can be derived from the alleged facts. See id. The Court, however, is not required to accept plaintiff's asserted inferences or conclusory allegations that are unsupported by the facts in the complaint. See id.

### B. EPA's Complaint Must Be Dismissed Because it Violates the Statute of Limitations and, Therefore, Fails to State a Claim Upon Which Relief Can Be Granted.

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<sup>2</sup> According to EPA's web site, TSCA § 8(e) information should be submitted to EPA within 30 calendar days after receipt of the information. See <http://www.epa.gov/oppt/tscas8e/>. For purposes of this Motion, Elementis adds 30 days to the date it received the Final Four Plant Report – on October 8, 2002 – in its analysis of EPA's claim accrual date.

<sup>3</sup> Elementis entered into several Tolling Agreements with EPA, the first of which was June 30, 2009. The Tolling Agreements only served to toll claims to the extent that claims existed as of the date of the Agreements. Since the first Tolling Agreement was entered into more than 19 months *after* the end of the limitations period, they are of no effect in this analysis.

<sup>4</sup> While Elementis contends in this Motion that the Complaint should be dismissed because it violates the statute of limitations, Elementis also disputes and denies the substantive allegation in the Complaint that it committed a violation of TSCA § 8(e).

**1. The Five-Year Statute of Limitations Set Forth in 28 U.S.C. § 2462 Applies to EPA's Claim Under TSCA § 8(e).**

The general five-year statute of limitations set forth at 28 U.S.C. § 2462 applies to enforcement actions for fines and civil penalties brought under TSCA. 3M Co. (Minnesota Mining and Mfg.) v. Browner, 17 F.3d 1453, 1457 (D.C. Cir. 1994); In re Lazurus, Inc., 7 E.A.D. 318, 364 (EAB 1997); In re Newell Recycling Company, 8 E.A.D. 598, 614 (EAB 1999).

The statute provides:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462.

In 3M Co., 17 F.3d 1453 (D.C. Cir. 1994) – a case involving EPA's assessment of a civil penalty under TSCA – the United States Court of Appeals for the District of Columbia Circuit held that the general five-year statute of limitations applies to penalty actions or proceedings brought in administrative agencies. 3M Co., 17 F.3d at 1457. The 3M court stated: "Because assessment proceedings under TSCA seek to impose civil penalties, they are proceedings for the 'enforcement' of penalties and § 2462 thus applies." Id. at 1459.

The Court further held that the limitations period begins to run when the violation occurs, not upon discovery of the violation by EPA. In rejecting EPA's argument for application of the "discovery rule," the Court stated that an enforcement case does not present the circumstances calling for application of the discovery rule:

We are interpreting a statute, not creating some federal common law. The provision before us, § 2462, is a general statute of limitations, applicable not just to EPA in TSCA cases, but to the entire federal government in all civil penalty cases, unless

Congress specifically provides otherwise. We therefore cannot agree with EPA that our interpretation of § 2462 ought to be influenced by EPA's particular difficulties in enforcing TSCA. And we cannot understand why Congress would have wanted the running of § 2462's limitations period to depend on such considerations. An agency may experience problems in detecting statutory violations because its enforcement effort is not sufficiently funded; or because the agency has not devoted an adequate number of trained personnel to the task; or because the agency's enforcement program is ill-designed or inefficient; or because the nature of the statute makes it difficult to uncover violations; or because of some combination of these factors and others . . . An agency's failure to detect violations, for whatever reasons, does not avoid the problems of faded memories, lost witnesses and discarded documents in penalty actions brought decades after alleged violations are finally discovered. Most important, nothing in the language of § 2462 even arguably makes the running of the limitations period turn on the degree of difficulty an agency experiences in detecting violations.

Id. at 1461.

**2. The Limitations Period Began to Run After Elementis Did Not “Immediately” Inform EPA of the Information in the Final Four Plant Report Received on October 8, 2002.**

Pursuant to 28 U.S.C. § 2462, the limitations period begins to run “when the claim first accrued.” The provision of TSCA at issue in this case, § 8(e), provides that

Any person who manufactures, processes, or distributes in commerce a chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment shall *immediately* inform the Administrator of such information ....

15 U.S.C. § 2607(e) (emphasis added). The provision is clear on its face that a claim for violation of § 8(e) first accrues when a person fails to “immediately” inform the agency of information relating to substantial risk of injury to health or the environment. Elementis received the Final Four Plant Report on October 8, 2002. The parties entered into their first Tolling Agreement on June 30, 2009, which tolled claims from that date onward. Five years

before June 29, 2009 is June 29, 2004. June 29, 2004 is over 20 months after Elementis received the Final Four Plant Report on October 8, 2002. Thus, for EPA's claim to be timely, "immediately" would require an interpretation that Elementis had over 20 months under § 8(e) – from October 8, 2002 to June 29, 2004 – to report information in the Final Four Plant Report to EPA before the limitations period would begin to run. Such an interpretation is contrary to the unambiguous language in the statute and would produce an absurd result.

EPA itself has interpreted the term "immediately" to mean a period far less than 20 months. EPA has published guidance on its website that "8(e) notices should be submitted within 30 calendar days after obtaining information that a substance or mixture presents a substantial risk." See <http://www.epa.gov/oppt/tsca8e/>. Therefore, according to EPA, a violation of TSCA § 8(e) will first accrue if information that should have been submitted is not submitted within 30 days after the person comes into possession of the information. Under EPA's guidance, the statute of limitations for EPA to bring an enforcement action under TSCA § 8(e) begins to run on the 31st day after the person receives substantial risk information. While it is not clear whether or not EPA's own interpretation of "immediately" being within 30 days of receipt is correct, what is clear is that no reasonable interpretation of the word "immediately" extends to 20 months.

### **3. EPA's Complaint Cannot Be Saved by a Theory of Continuing Violation.**

Given EPA's clear failure to file its Complaint within the applicable five-year limitations period, we assume that EPA will urge that the violation at issue was "continuing." However, the general rule is that violations are not continuing. The "continuing violation" doctrine is an exception to the general rule, providing a "special accrual rule" for purposes of analyzing when the limitations period begins to run. *In re Lazarus, Inc.*, 7 E.A.D. 318, 364 (EAB 1997). Courts

do not apply the “continuing violation” doctrine without first looking to the statutory language that forms the basis of the violation at issue to determine whether the requirements are continuing in nature. Id. at 366. As explained below, TSCA § 8(e), by its very terms, cannot form the basis of an assertion of continuing violation.

In some circumstances, a person may be in violation of a TSCA requirement or a regulation issued by EPA pursuant to TSCA, and that violation will continue until it is remedied. See, e.g., In re Lazarus, Inc., 7 E.A.D. at 364; In re Newell Recycling Company, 8 E.A.D. 598, 614 (EAB 1999); In Lazarus, although the Board applied the normal rule that, for a violation under TSCA, “[t]he limitations period begins to run when a violation first accrues,” the Board also recognized that:

The doctrine of continuing violations provides a special rule for determining when a violation first accrues. Under the special rule, the limitations period for continuing violations does not begin to run until an illegal course of conduct is complete.

In re Lazarus, 7 E.A.D. at 364 (citing Toussie v. United States, 397 U.S. 112, 115 (1970)). In applying this special rule, the Board in Lazarus stated that the statute or regulation at issue must be scrutinized to determine whether the statute or regulation presents a continuing requirement. Specifically, the Board stated that:

Words and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature. In contrast, a continuing nature may be negated by requirements that must be fulfilled within a particular time frame.

Id. at 366-67. In Lazarus, the Board went on to find that some of the violations alleged by EPA, such as the requirement to register PCB transformers with the fire department and the requirement to label the door of the transformer room, were continuing in nature because they were mandatory conditions for the continued use of PCB materials that was otherwise banned if

the conditions were not met. Id. at 368-76. Indeed, the Board noted that EPA's use of phrases such as "continued use" and "remaining useful life of PCB Transformers" in the preambles to the rules at issues evidenced the continuing nature of the registration requirement. Id. at 372.

Importantly, however, the Board also held that Lazarus' failure to prepare annual reports was not a continuing violation, because the annual reports had to be prepared within a certain timeframe, i.e., by July 1 of each year and that requirement was not necessary for the continued use of the PCBs. Id. at 378-79. That regulation provided:

Beginning July 2, 1978, each owner or operator of a facility using or storing . . . one or more PCB Transformers . . . shall develop and maintain records on the disposition of PCBs and PCB Items. These records shall form the basis of an annual document prepared for each facility by July 1 covering the previous calendar year . . . The records and documents shall be maintained for at least five years after the facility ceases using or storing PCBs.

Id. at 378 (quoting 44 Fed. Reg. 31,514, 31,557 (May 31, 1979)). The Board stated that this regulation, unlike the regulations concerning registration of PCBs, are independent obligations and are not conditions of the use of PCBs. Id. at 377. Specifically, the Board found that:

A separate limitations period begins to run each year that an annual document has not been prepared by July 1. An action for penalties may be initiated any time within the five-year period following each July 1. After expiry of the statutory period, however, the Region is barred from bringing an action for penalties. The limitations period for the 1978 annual document was triggered in 1979 and it expired in 1984. The limitations period for violations of the 1979 and 1980 annual document obligations expired in 1985 and 1986, respectively. Thus, the statute of limitations bars the Region from maintaining an action for penalties for annual document obligations for calendar years 1978-1980.

Id. at 379.

In this case, EPA alleges that Elementis violated TSCA § 8(e) because it failed to "immediately" inform the Administrator of EPA of the information contained in the Final Four

Plant Report. See Compl. ¶49. The statute's requirement that information be submitted "immediately" to EPA is no less certain a time frame than the requirement at issue in Lazarus that a party prepare annual reports by July 1 each year. Further, unlike the PCB transformer registration requirement, TSCA § 8(e) does not indicate that submission of "substantial risk" information is a condition of a party's ability to continue to manufacture a chemical substance.

Congress' inclusion of the immediate timeframe in TSCA § 8(e) makes it clear that this is not a continuing requirement and the continuing violation doctrine is not applicable. Thus, Elementis' alleged violation occurred, and EPA's claim accrued, when Elementis failed to "immediately" notify the EPA Administrator of the information in the Final Four Plant Report, not when EPA ultimately received or became aware of the report.

Accepting as true that Elementis obtained the Final Four Plant Report on October 8, 2002, Elementis did not have 20 months – the minimum time period that could save EPA's claim – to inform EPA of the information because TSCA § 8(e) requires that information be submitted "immediately." Even assuming for purposes of this Motion the application of EPA's policy that TSCA § 8(e) information should be submitted within 30 calendar days (i.e., by November 7, 2002) to satisfy the requirement that information be submitted "immediately," EPA had five years from that date – until November 7, 2007 – to file a claim for violations of TSCA § 8(e).

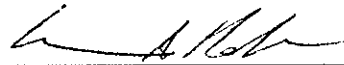
**4. EPA Failed to File the Complaint Within Five Years of the Accrual of the Claim and, Therefore, the Complaint Must Be Dismissed.**

As discussed above, EPA had until November 7, 2007 to file an enforcement action against Elementis for the alleged failure of Elementis to inform EPA of the Final Four Plant Report. However, the Complaint in this case was not filed until September 2, 2010, almost three years beyond the expiration of the limitations period. Therefore, the Complaint must be dismissed with prejudice for failure to state a claim upon which relief can be granted.

### III. CONCLUSION

For the foregoing reasons, Elementis respectfully requests that the Presiding Officer grant its Motion for Judgment on the Pleadings.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, William S. Pufko, hereby certify that on December 15, 2010, I served a copy of Respondent's Motion for Judgment on the Pleadings and supporting documents, via e-mail and first class mail on the following:

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Waste and Chemical Enforcement Division  
Office of Civil Enforcement  
U.S. Environmental Protection Agency  
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\_\_\_\_\_  
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